IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	(BK No. 90-41135)
	)	(Adv. No. 90-4025)
S.I. BOWLING & RECREATION CENTER, INC.,	)	
Debtor,	)	
S.I. BOWLING & RECREATION CENTER, INC.,	)	Civil Nos. 91-4166-JLF 92-4180-JLF
Appellant,	)	
KENNETH M. BAYER as General Partner of The Bayer Company, a limited partnership, and THE BAYER COMPANY,	)	
Appellees.	)	
S.I. BOWLING & RECREATION CENTER, INC.,	)	Civil No. 91-4261-JLF
Debtor/Appellee,	)	
V.	)	
KENNETH M. BAYER as General Partner of The Bayer Company, a limited partnership, and THE BAYER COMPANY,	)	
Appellants.	)	

MEMORANDUM AND ORDER

Before the Court are three appeals from three separate orders entered in Bankruptcy Case No. 90-41135 by the Bankruptcy Court in the Southern District of Illinois. The orders were entered in a case or proceeding referred to the bankruptcy judge under 28 U.S.C. § 157 (1988). Thus, this Court has jurisdiction to hear the appeals under 28 U.S.C. §§ 158, 1334. The three appeals will be consolidated for

purposes of this Memorandum and Order.

I. BACKGROUND

In March of 1976, Kenneth M. Bayer (Bayer) and S.I. Bowling & Recreation Center, Inc. (S.I. Bowl), entered into a contract for deed covering real estate located off Illinois Route 13 near the Williamson County Airport. The parcels included a paved parking lot and the building which currently houses a bowling alley and a night club. In June of 1988, S.I. Bowl entered into a second contract for deed with Bayer as General Partner of The Bayer Company. The second contract included additional real estate adjoining the real estate contained in the first contract.

In September of 1988, S.I. Bowl signed a promissory note (to Bayer) for $40,000.00, to be paid in installments of $1,296.00. Three of these installments, totalling $3,888.00, were paid in November of 1989, December of 1989 and in January of 1990, within one year of the filing of the bankruptcy petition.

S.I. Bowl subsequently went into default in making payments under the second contract for deed. A release and cancellation agreement between the parties was executed on September 14, 1990, which provided that S.I. Bowl transferred all of its interest in the second contract for deed back to Bayer. S.I. Bowl also executed a quit-claim deed of the real estate described in the second contract to The Bayer Company. Both of these documents were recorded in the Williamson County Recorder's Office.

Concurrent with the September 14, 1990, transaction, the parties entered into a lease of a parcel of land which was included within the

real estate described in the second contract for deed. The parcel consisted of a volleyball court and improvements placed there by S.I. Bowl (i.e., sand pits, deck, lighting system) for use by its business patrons. The lease agreement provided for monthly payments of $250.00, beginning on September 14, 1990. No payments on this lease have been made by S.I. Bowl to date. Two weeks later, on September 28, 1990, S.I. Bowl filed for relief under Chapter 11 of the Bankruptcy Code.

On February 20, 1991, Bayer filed a Petition for Possession of the volleyball court. The Bankruptcy Court granted Bayer's petition, in part, and held that the debtor never formally assumed or rejected the lease within 60 days after the filing of bankruptcy, as required by 11 U.S.C. § 365(d). The Bankruptcy Court further found that the debtor did not assume the lease by its conduct. S.I. Bowl has appealed this decision in Appeal No. 91-4166.

On February 27, 1991, S.I. Bowl filed an amended three count complaint to avoid the transfer of interest in real estate under sections 547 and 548 of the Bankruptcy Code (Counts II and III). Count I sought to avoid the transfer of payments to Bayer totalling $3,888.00 as a preference under section 547. Relief was denied on all three counts. The Debtor has appealed only Count I of the Bankruptcy Court's holding that the payment of $3,888.00 was not a preference under section 547 (Appeal No. 92-4180).

On May 10, 1991, Bayer filed a motion for relief from the stay, asserting that S.I. Bowl is indebted to it in the amount of $525,000.00, based on the default under the first contract for deed. The Bankruptcy Court held a valuation hearing and determined that S.I.

Bowl was indebted to Bayer in the amount of $589,000.00 on the first contract for deed.[1] The Bankruptcy Court further held that the value of the real property was $404,800.00, and was to be determined as of the date of the filing of the bankruptcy petition; from this amount the court deducted the costs of sale that would be incurred upon liquidation. The Bankruptcy Court also held that the highest and best use of the property was as a bowling and recreation center. Bayer has appealed from all findings of fact and conclusions of law in Appeal No. 91-4261.

II. DISCUSSION

These appeals raise issues of both fact and law. In a bankruptcy appeal, the bankruptcy court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Bankruptcy Rule 8013. See also In re Excalibur Auto. Corp., 859 F.2d 454, 458 (7th Cir. 1988); In re Evanston Motor Corp., 735 F.2d 1029, 1031 (7th Cir. 1984). However, where questions of law are concerned, the district court will review the bankruptcy court's ruling de novo. In re Sanderfoot, 899 F.2d 598, 600 (7th Cir. 1990); In re Evanston Motor Corp., 735 F.2d at 1031.

The Bankruptcy Rules provide that oral argument shall be allowed in all cases

> unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs and record, or

[1]The correct amount, $523,146.06, was determined by a consent order entered by the Bankruptcy Court on June 1, 1992.

> appendix to the brief, that oral argument is not needed....
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> Oral argument will not be allowed if (1) the appeal is frivolous; (2) the dispositive issues or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Bankruptcy Rule 8012. The Court finds that the facts and legal arguments of this case are well presented in the parties' briefs and, thus, oral argument is unnecessary.

A. Assumption/Rejection of Lease Under § 365(d)(4)

At issue in this appeal is whether the Bankruptcy Court erred in holding that section 365(d)(4)[2] requires the debtor to file a formal motion within the 60-day period following bankruptcy in order to assume an unexpired lease of non-residential real property. This conclusion of law will be reviewed de novo. In re Sanderfoot, supra.[3] For the reasons stated below, the Court hereby AFFIRMS the holding of the Bankruptcy Court.

Section 365(a) of the Bankruptcy Code gives the trustee (or debtor in possession) the authority assume or reject an executory contract (or an unexpired lease) once it determines that a particular contract will

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[2]In its order of April 16, 1991, the Bankruptcy Court appears to have erroneously listed § 365(d)(2) as the basis for its conclusion. However, at the hearing for the motion to reconsider, the court clearly articulated that this dispute involved an executory lease of nonresidential real property under § 365(d)(4). See Transcript of Hearing on Motion to Reconsider, p. 14.

[3]There is no dispute that S.I. Bowl failed to file a formal motion to assume the lease in question.

benefit or burden the bankruptcy estate. Section 365(d)(3) provides that the trustee must timely perform the debtor's obligations under the unexpired lease until that lease is assumed or rejected. At issue here is the meaning of section 365(d)(4), which regards the assumption or rejection of an unexpired lease of nonresidential real property. This section provides:

> (4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. 365(d)(4) (emphasis added).[4] Bayer asserts that the only action which triggers the assumption of the lease is the formal filing of a motion to assume within 60 days of the filing of the bankruptcy petition. The debtor, on the other hand, argues that an assumption of the lease under this section may be implied by its conduct. Although there is a split of authority on this issue, the Court finds that under the circumstances in this case, the debtor is required to file a motion within the 60-day period in order to assume a lease pursuant to section 365(d)(4).

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[4]Section 365(d)(1) also provides for a 60-day period in a chapter 7 case to assume or reject an executory contract or unexpired lease of residential real property or personal property of the debtor; section 365(d)(2) provides that in a chapter 11 (and 9, 12 or 13) case, the trustee may assume or reject an executory contract or unexpired lease of residential real property at any time prior to confirmation of the plan.

Although the case of Matter of Whitcomb & Keller Mortgage Co., Inc., 715 F.2d 375 (7th Cir. 1983) was decided prior to the addition of section 365(d)(4) to the Bankruptcy Code, it illustrates the Seventh Circuit's unwillingness to infer an intent to assume a contract from the conduct of the debtor under section 365. In Whitcomb, the debtor had entered into a contract for computer services and subsequently filed bankruptcy. The court agreed that the debtor's utilization of computer services during the administration of the estate did not support a finding that it had assumed the contract. Id. at 379-80. The court held that only an express order of the judge (pursuant to a formal motion to assume) was sufficient to assume the contract. The court affirmed the district court's decision not to engage in an analysis of the conduct of the debtor in order to infer an intention to assume. Id.

Under cases dealing specifically with section 365(d)(4), and cases dealing with the virtually identical section 365(d)(1), most cases find that the only action which clearly indicates assumption of a lease is the filing of a formal motion within the 60-day period. See, e.g., In re BDM Corp., 71 B.R. 142, 143-44 (Bankr. N.D. Ill. 1987) (only method to assume under 365(d)(4) is through formal motion); see also In re Curry Printers, Inc., 135 B.R. 564, 571 (Bankr. N.D. Ind. 1991) (only way to assume under 365(d)(1) is through formal motion); In re Uly-Pac, Inc., 128 B.R. 763, 765 (Bankr. S.D. 111. 1991) (same); In re Del Grosso, 115 B.R. 136, 138-39 (Bankr. N.D. 111. 1990) (same); but see In re Casual Male Corp., 120 B.R. 256, 260-61 (Bankr. D. Mass. 1990) (section 365(d)(4) requires timely, unequivocal statements to the

lessor regarding debtor's intent to assume); In re Lane, 96 B.R. 164, 166 (Bankr. CD. Ill. 1988) (assumption under section 365(a) requires clear, unequivocal conduct); cf. In re Bon Ton Restaurant & Pastry Shop, Inc., 52 B.R. 850, 853-54 (Bankr. N.D. Ill. 1985) (no time constraints exist for entry of court approval; but trustee must act within the 60-day period, and where trustee had filed motion within the 60 days, lease is not deemed rejected under § 365(d)(4)).[5] This Court likewise finds that under the circumstances of this case, where the debtor has not filed any @ of formal motion to assume the lease within the 60-day period, nor had debtor requested any extension of this time period, the lease is deemed rejected pursuant to section 365(d)(4).[6]

Even in cases which allow the assumption of a lease to be made by the conduct of the debtor, that conduct must be made within the 60-day period and must be unequivocal. See In re Lane, 96 B.R. at 166; see also In re Casual Male, 120 B.R. at 260-61. In this case, the Bankruptcy Court made a finding of fact on the issue of whether S.I. Bowl, through its conduct, assumed the lease. The court stated: "The debtor never formally assumed nor rejected the lease with Bayer within the 60-day period after the order for relief.... Neither did the debtor assume the lease by its actions." (Record on Appeal, Ex. E, April 16,

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[5]The Court notes that the Bankruptcy Rules 6006 and 9014 also support the finding that the filing of a formal motion is required. Rule 6006 provides that a proceeding to assume or reject is governed by Rule 9014, and it in turn provides that relief shall be requested by motion. See Bankruptcy Rule 6006 and 9014.

[6]The Court also notes that the debtor in this case has not performed its obligations under this lease, (i.e., monthly payments), as required under § 365(d)(3).

1991 Order, p. 3). The Bankruptcy Court also heard evidence regarding this conduct at the hearing on the motion to reconsider.

Counsel for both sides submitted affidavits prior to the motion to reconsider averring that certain discussions took place within the 60-day period following the filing of the petition on September 28, 1990.[7] The affidavit of Bayer's counsel denies that the two conversations during this 60-day period involved the lease for the volleyball court. (Record on Appeal, Ex N, ¶5 and ¶6.) Nothing in the affidavit submitted by counsel for S.I. Bowl, nor in the hearing on the motion to reconsider, indicates the debtor's conduct regarding its intent to assume the lease occurred during the 60-day period. (See Record on Appeal, Ex 1, ¶5, ¶6 and ¶7; Transcript of Hearing on Motion to Reconsider, p. 8-10.) The Court concludes that this factual finding, although not necessary to the Bankruptcy Court's decision in this case, was not clearly erroneous. Thus, the decision of the Bankruptcy Court is hereby AFFIRMED.

B. Valuation of Property

There are four issues before the Court on this appeal: (1) whether the Bankruptcy Court's factual finding that the value of the property was $404,800, was clearly erroneous; (2) whether the Bankruptcy Court's finding that the best and highest use of the property was as a bowling alley and recreation center was clearly erroneous; (3) whether the time to value the property is as of the time the petition is filed; and (4)

[7]The Court emphasizes that the conduct indicating an intent to assume must occur during the 60-day period. Any conduct or statements made before bankruptcy are not timely made under § 365(d)(4).

whether deduction of the costs of sale from the value was proper.

1. Valuation of Property

The Bankruptcy Court's finding that the value of the property was $404,800.00 is one of fact and will not be set aside unless clearly erroneous. See In re Excalibur Auto. Corp., supra; see also Matter of Vitreous Steel Prod. Co., 911 F.2d 1223, 1232 (7th Cir. 1990). Moreover, this finding was based primarily upon the Bankruptcy Court's determination regarding the testimony of the two expert witnesses at the valuation hearing. In matters of credibility, the Bankruptcy Court is to be given due regard in accordance with Bankruptcy Rule 8013.

The valuation hearing was conducted pursuant to Section 506, Determination of Secured Status, which provides in pertinent part:

> (a) An allowed claim of a creditor ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property.... Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a).

The expert witness for the debtor was a Mr. Sandy Hansel ("Hansell"), a broker and appraiser of bowling centers for 15 years. Valuation Hearing Transcript ("Hearing"), p. 12. He is also a licensed real estate broker in Illinois. Hearing, p. 13. Although licensed in Illinois, Hansell did not have extensive experience in valuing real estate in Southern Illinois.

In arriving at a valuation figure of $404,800.00, Hansell considered: a questionnaire filled out by the owner of S.I. Bowl which

described the building and equipment; financial statements; pictures of the facility; an appraisal done by American Appraisal Associates; his own study of the market for bowling centers in the area (i.e., how many lanes could be adequately supported by the area's demographics); a comparison of S.I. Bowl to the other bowling alleys in the area; and, his physical inspection of the actual site. Hearing, p. 16-22. The main focus by Hansell was on the income approach to valuation of S.I. Bowl. See Hearing, p. 48-49. Hansell also testified based on use of a comparable sales approach, and he discussed the costs that would be incurred if the bowling center was converted to another commercial use. See Hearing, p. 31-34 (floors would have to be redone because they cannot bear the weight required for any other commercial uses, and because floor is currently three levels; the parking lot would have to be resurfaced; partitions would have to be removed; and air conditioning would have to be installed. Hansell then incorporated these conversion costs in arriving at the $404,800.00 figure."[8]

The expert for the creditor was a Mr. Ronald W. Reeder ("Reeder"). Reeder was a real estate appraiser for 16 years in the Southern Illinois area. Hearing, p. 52-54. Reeder, using the market analysis approach consisting of comparing the instant property to comparable sales in the vicinity, appraised the property at approximately

[8]In order to arrive at the figure, Hansell testified that the bowling and recreation center had a value of $880,000.00, that 50% would be allocated to the real estate, and an 8% sales commission would be deducted. See Hearing, P. 25, 27, 35-37.

$534,000.00 at the time of the filing of the petition.[9] Hearing, p. 68. Upon cross-examination, it appears that some doubt may have been cast regarding how comparable some of the sales really were to the S.I. Bowl property. See Hearing, p. 75-84. Reeder also did not include in his appraisal any deduction for costs that would likely have been necessary to convert the building to any other commercial use. Hearing, p. 95-96. Nor did Reeder express any opinion regarding the value of S.I. Bowl if it were to continue as a bowling center. Hearing, p. 99.

In the Bankruptcy Court, Judge Fines credited the testimony of Hansell versus that of Reeder by essentially adopting the valuation of $404,800.00 based on Hansell's income approach. See Record on Appeal, Ex. 121, October 10, 1991, Order, p. 2, ¶7; see also In re Pullman Constr. Indus., Inc., 107 B.R. 909, 938 (Bankr. N.D. 111. 1989) ("going concern" valuation is proper for establishing amount of secured creditor's claim). This finding is fully supported in the record. It is in the debtor's plan to retain the bowling center as a bowling center. Hearing, p. 106. Thus, the testimony of Hansell could be considered as relevant, if not more relevant than Reeder's in determining the value of the property under section 506. See 11 U.S.C. § 506(a) ("[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property..."). The Court does not consider this factual finding clearly erroneous.

2. Best and Highest Use

[9]As of the date of the hearing, Reeder would appraise the property at $690,000. Hearing, p. 73.

The Bankruptcy Court's finding that the best and highest use of the property was as a bowling and recreation center is also one of fact and will not be set aside unless clearly erroneous. See In re Excalibur Auto. Corp., supra. This finding was also based upon the Bankruptcy Court's determination regarding the testimony of the two expert witnesses at the valuation hearing. See Record on Appeal, Ex. 121, October 10, 1991, Order, p. 1-2, 1 5. As previously noted, the Bankruptcy Court is to be given due regard in judging the credibility of the witnesses. Bankruptcy Rule 8013.

In a valuation hearing, a creditor has the burden to prove that the property is more valuable for a purpose other than its current use, and that such alternative use is not merely speculative. See In re Elirich, 109 B.R. 390, 392 (Bankr. D.S.D. 1989). The debtor's expert, Hansell, testified that a building of this type is primarily a single purpose facility. Hearing, p. 31. He further testified regarding the difficulty encountered in attempting to obtain financing for a bowling center. Hearing, p. 25-26. He also discussed the significant renovation expenses that would be incurred to convert this building to another commercial use. Hearing, p. 30-35. Based on this testimony, the Bankruptcy Court found that the highest and best use of the property was as a bowling center.

In contrast, Reeder testified that the best and highest use of the facility was as a warehouse. Hearing, p. 84-87. He did not appear to consider conversion costs as any part of his analysis, nor did he render any opinion regarding the facility's current value as a bowling center. Hearing, p. 87, 95, 96; Hearing, p. 99. His testimony could

reasonably be viewed as too speculative.

Based on the testimony of the two experts, the Bankruptcy Court was not clearly erroneous in finding that Bayer did not meet its burden in showing that the best and highest use of this property was as something other than a bowling and recreation center. See In re Ehrich, supra.

3. Time to Value the Property

The Bankruptcy Court ruled that the appropriate time at which to value the property is the date of the filing of the bankruptcy petition. Record on Appeal, Ex. 121, October 10, 1991, Order, p. 2, ¶6. This issue, unlike the previous two, involves a question of law, and thus, will be reviewed de novo. In re Sanderfoot, 899 F.2d 598, 600 (7th Cir. 1990); In re Evanston Motor Corp., 735 F.2d at 1031.

The Court notes that there is a definite split of authority on the issue. One line of cases holds that the date of the filing of the bankruptcy petition is the key date since this is when the estate is created, and when the creditors' rights become fixed. See In re O'Gara Coal Co., 12 F.2d 426, 429-30 (7th Cir.), cert. denied, 271 U.S. 683 (1926); United States v. Zlogar, 126 B.R. 53, 57-58 (Bankr. N.D. Ill. 1991); In re Beard, 108 B.R. 322, 323-27 (Bankr. N.D. Ala. 1989); Matter of Dente/Pender, 60 B.R. 164, 165 (Bankr. M.D. Fla. 1986); In re Ladycliff College, 56 B.R. 765, 768 (S.D.N.Y. 1985); In re Adams, 2 B.R. 313, 314 (Bankr. M.D. Fla. 1980). The other line of authority holds that the collateral should be valued at or near the time of the confirmation of the plan. See In re Ahlers, 794 F.2d 388, 398-99 (8th Cir. 1986), rev'd on other grounds, 485 U.S. 197 (1988); Matter of

Seip, 116 B.R. 709, 711-12 (Bankr. D. Neb. 1990).[10]

The Court holds that the better rule is to value the collateral at the time of the filing of the bankruptcy petition. First, this is arguably the rule in this circuit. See In re O'Gara Coal Co., 12 F.2d 4261 429-30 (7th Cir. 1926) (under comparable section of old Bankruptcy Act, value of secured claim determined as of date of petition). Second, when the collateral is of a type which normally depreciates in value (i.e., a car), the creditor should be entitled to protection as of the time of the filing of the petition. See In re Beard, 108 B.R. 326-27 (the value of creditor's lien at the time of filing is what is constitutionally protected from an improper "taking" under the Fifth Amendment of the Constitution). However, when the collateral is of a type whose value may either stay the same or appreciate, this appreciation should inure to the benefit of the debtor under the fresh-start principles of the Bankruptcy Code. Cf. U.S. v. Zlogar, 126 B.R. 53, 57-58 (Bankr. N.D. 111. 1991) (under section 506(a) and (d) in a Chapter 7 case, real property should be valued as of petition date and any postpetition appreciation should inure to benefit of debtor). Third, there is some merit to the argument that because Ahlers has been reversed (albeit on other grounds), it and the cases following it are simply less persuasive as precedent on the issue. For the reasons stated, the Court holds that the appropriate time to value the collateral under section 506(a) is as of the time of the filing of the petition.

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[10]The best discussions regarding each line of authority are found in In re Beard and Matter of Seip, supra.

4. Deduction of Sale Costs

The Bankruptcy Court, in arriving at a figure of $404,800.00 for the value of the collateral, deducted the costs associated with a hypothetical sale of the property. See Hearing, p. 27; Record on Appeal, Ex. 121, October 10, 1991, Order, p. 2, ¶7.[11] This issue also involves a question of law, and will be reviewed de novo. In re Sanderfoot, 899 F.2d 598, 600 (7th Cir. 1990); In re Evanston Motor Corp., 735 F.2d at 1031.

The Court cannot discern a clear majority rule regarding whether the costs of a hypothetical sale should be deducted from the valuation figure under section 506. Rather, a case-by-case approach has been taken on this issue. Under what some cases refer to as the majority rule, the hypothetical costs of sale are deducted regardless of whether the debtor plans to retain the collateral. See In re Ehrich, 109 B.R. 390, 391-92 (Bankr. D.S.D. 1989). The focus here is solely on the creditor's interest and this interest is defined as what would be received upon a sale of the property. Id. at 391. Cf. In re Schaumberg Hotel Owner Ltd., Partnership, 97 B.R. 943, 948-49 (Bankr. N.D. 111. 1989) (present appraised value of property assumes a sale through normal marketing efforts and the costs associated with the sale; here, the debtor's plan contemplated a sale of the collateral).

The Court, however, holds that the better rule is to not deduct

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[11]Hansell testified that the value of the property was $880,000.00, that 50% would be allocated to the real estate ($440,000.00), and a typical commission charge would be 8% (8% of $440,000.00 is $35,200.00, and this amount was deducted to arrive at the value of $404,800.00). See Hearing, p. 25, 27, 35 and 36.

hypothetical sale costs from the value of the collateral when the debtor plans to retain the property. Many cases support this view as a proper interpretation of section 506's language that the valuation should be done with an eye toward the proposed disposition of the property. See 11 U.S.C. § 506(a); In re Spacek, 112 B.R. 162, 163-64 (W.D. Tex. 1990) (where chapter 11 plan proposes retention of property, no deduction of liquidation costs is necessary); In re Pullman Constr Indus., Inc., 107 B.R. 909, 938 (Bankr. N.D. Ill. 1989) (Chapter 11 valuation should not incorporate a forced-sale or liquidation value when debtor proposes to retain property); In re Balbus, 104 B.R. 767, 768-69 (Bankr. E.D. Va. 1989) (in chapter 13 case, section 506(a) valuation should be done without imposing costs of hypothetical sale where sale is not in debtor's plan), af'd, 933 F.2d 246 (4th Cir. 1990); cf. In re Beacon Hill Apartments, Ltd., 118 B.R. 148, 150-52 (Bankr. N.D. Ga. 1990) (deduction of sale cost not required where cost were never incurred and where the parties had agreed that debtor would pay them).

There has also been a recent United States Supreme Court case that supports this interpretation. See United States Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988). At issue in Timbers was the meaning of the creditor's "interest in property" under section 362(d)(1) of the Bankruptcy Code. Id. at 368. The Court analyzed similar language in section 506(a) regarding the creditor's interest in property, and determined that in the context of 506(a), the creditor's secured interest is viewed "without taking account of his right to immediate possession of the collateral upon

default...The phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.'" Id. at 372.[12] Although the precise issue regarding deduction of costs was not before the Court, it is still useful as a guide to interpreting section 506(a). As the court noted in In re Balbus, this language from Timbers helps to avoid a strained interpretation of 506(a) which would ignore the actual and intended use of the property. In re Balbus, 104 B.R. at 769. Thus, the Court concludes that hypothetical disposition costs should not be deducted from the value of the collateral when the debtor's plan is to retain the property.

The amount of costs improperly deducted in this case was $35,200.00. Adding this figure back to the valuation of the property ($404,800.00) increases the valuation amount to $440,000.00. The Court hereby REMANDS this case back to the Bankruptcy Court for the sole purpose of entering the correct valuation amount of $440,000.00.

C. Preference Payments Under § 547(b)[13]

As mentioned briefly above, the debtor is appealing the Bankruptcy Court's denial of relief on Count I of its complaint. Count I sought to avoid the transfer of payments on a promissory note from the debtor

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[12]The Supreme Court held that under § 362(d)(1), when an undersecured creditor invokes a relief from the stay on the ground of inadequate protection, the creditor's interest in property does not include a right to immediate foreclosure. Thus, the creditor was not entitled to interest on the collateral due to the delay caused by automatic stay in foreclosing on the collateral. Timbers, 484 U.S. at 382.

[13]Bayer, in response to the Court's request to respond to Appellant's Brief, waived its right to do so (Document #11).

to Bayer totalling $3,888.00, as a preference under section 547.[14] The Bankruptcy Court held that the payment of $3,888.00 was not a preference under section 547 because the debtor had failed to prove, by a preponderance of the evidence, that Bayer received more than he would have received under a chapter 7 liquidation. See Record on Appeal, Ex. 7, July 2, 1992 Order, p. 5-6, Finding of Fact ¶23, Conclusion of Law § B, ¶

1. For the reasons stated below, the Court REVERSES the decision by the Bankruptcy Court.

A trustee may avoid a transfer of an interest of the debtor under section 547, if the following elements are shown. If the transfer is:

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made--
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if--
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b)(l)-(5). The only element at issue in this appeal is what a trustee must show, by a preponderance of the evidence, under section 547(b)(5).[15]

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[14]The $3880 consists of three payments of $1296 each made on 1/18/90, 12/28/89 and 11/14/89 (Record on Appeal, Ex. 7, p. 2-3, ¶8).

[15]The Court notes that there was no dispute regarding some of the § 547(b) elements and others were stipulated to by the parties.

The Bankruptcy Court made both a finding of fact and a conclusion of law that S.I.Bowl failed to introduce evidence on which the Court could determine whether Bayer would have received more under a Chapter 7 liquidation. Record on Appeal, supra, Ex. 7, p. 5-6. The Court disagrees with both findings.

The minimal showing a trustee must make is that an unsecured creditor[16] will receive less than 100% upon distribution. This determination is made at the time the bankruptcy petition is filed by comparing the debtor's total indebtedness versus its liabilities. In this case, the Bankruptcy Court had before it all the information it needed to reach the correct conclusion. On the date of filing, S.I. Bowl had total liabilities of $1,416,503.41 and assets of $648,633.00. Record on Appeal, Finding of Fact, ¶18. An unsecured claim is paid after secured claims in a bankruptcy distribution. There is no way that an unsecured claim will receive 100 cents on the dollar upon distribution in this case. The receipt by Bayer of the three payments totalling $3880.00 in the year prior to bankruptcy gave him more on this unsecured claim than he would receive upon distribution on the estate. These payments necessarily depleted the amount available for the payment of other unsecured claims. As such, they were preferences under section 547(b). The cases are in accord with the Court's ruling.

See, e.g., Transcript of Trial on Preference Complaint, p. 115 (debtor's insolvency) and p. 185 (insider status).

[16]For the purposes of this claim, Bayer is an unsecured creditor because, while the promissory note was personally guaranteed by several people connected with S.I.Bowl, no specific collateral was pledged, so it is not a secured claim within the provisions of the Code. See 11 U.S.C. § 506(a).

See In re Jolly "M', Inc., 122 B.R. 897, 904 (Bankr. D.N.J. 1991); In re Kel-Wood Timber Prod. Co., 122 B.R. 498,501-02 (Bankr. E.D. Va. 1990); see also In re McLean Indus., Inc., 132 B.R. 2471 262-63 (Bankr. S.D.N.Y. 1991); In re Investment Bankers, Inc., 136 B.R. 1008, 1020 (D. Colo. 1989); 4 Collier on Bankruptcy, ¶ 547.08, p. 547-41 to 547-43, n. 4, 7 (15th ed. 1992). Whether viewed as a finding of fact or a conclusion of law, the Bankruptcy Court erred by not finding that Bayer received more than he would have upon a Chapter 7 liquidation due to his receipt of the $3880.00.

The Court hereby REVERSES the Bankruptcy Court's ruling on Count I, and REMANDS with direction to the court to order Bayer to return to the trustee $3,888.00, plus interest, as of the date of the filing of the bankruptcy petition.

III. CONCLUSION

The Court hereby AFFIRMS the Bankruptcy Court (in BK No. 90-41135; Adversary No. 90-4025) in Appeal No. 91-4166-JLF. In Appeal No. 91-4261-JLF, the Court AFFIRMS in part and REVERSES in part; the Court REMANDS the case back to the Bankruptcy Court for the sole purpose of entering the correct valuation amount of $440,000.00. In Appeal No. 92-4180-JLF, the Court hereby REVERSES the Bankruptcy Court's ruling on Count I, and REMANDS with direction to the court to order Bayer to return to the trustee $3,888.00 plus interest as of the date of the filing of the bankruptcy petition.

IT IS SO ORDERED.

DATED: 3/1/93

/s/ James L. Foreman
SENIOR DISTRICT JUDGE